SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

ROBERT W. STANLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
JEROME M. FEIT,
LEONARD J. DICKSTEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OCTOBER TERM, 1969

No. 586

ROBERT W. STANLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of transporting stolen securities in interstate commerce in violation of 18 U.S.C. 2314. On May 9, 1969, the court of appeals affirmed the judgment, 411 F. 2d 514 (C.A. 7), and a petition for rehearing was denied on July 11, 1969.

On August 1, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 9, 1969. The petition, however, was not filed until September 10, 1969, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the single issue raised by the petitioner—whether the court below erred in de-

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termining that the admission of evidence that petitioner had committed another similar crime was not reversible error in view of the fact that trial here was to the court and that there was more than sufficient other competent evidence to establish petitioner's guilt—does not merit plenary review by this Court.

1. Petitioner and a co-defendant [1] were tried on the first count of a multi-count indictment charging the illegal transportation of stolen securities in interstate commerce. Petitioner was charged only in count I, which was severed for trial from the rest of the indictment.

In outline, the government introduced the following evidence. In 1962, petitioner, a California attorney, met LeRoy Holmen, who was then an inmate at the Los Angeles County Jail.[2] In February, 1965, Holmen was paroled from state custody and, because he had failed to post the required bond, was immediately taken into custody on consecutive federal sentences which were then pending on appeal. Holmen solicited petitioner's assistance in obtaining his release on bond pending appeal and suggested that, if released, he would be able to assist petitioner in negotiating stolen securities through an acquaintance he had met in prison who was reported to have banking connections useful for the placing of stolen securities.

Petitioner arranged for Holmen to pay a reduced premium on a bail bond (Tr. 577–583). Petitioner

[1] This co-defendant, Victoria Raaf, was also convicted but did not appeal.

[2] Holmen used the alias of Robert Morgan.

then gave Holmen money for his and his wife's air fare from San Francisco to Los Angeles and also paid for temporary hotel lodging for Holmen in Los Angeles, and for the rental of an office across the hall from petitioner's own law office (Tr. 589).

In August, 1965, petitioner and Holmen were introduced to one Frank Striffler, who testified that he had burglarized a residence in Beverly Hills, California, and obtained several thousand dollars worth of securities (T. 44–48). Acccording to Striffler, petitioner subsequently telephoned him regarding the securities and they arranged a meeting at Holmen's apartment, at which Holmen and petitioner negotiated the purchase of certain stolen securities for $2,000 (Tr. 49–51). Petitioner told Striffler that they would call him when they needed the securities and that Holmen would be handling the details of the transaction (Tr. 54–57).

Holmen contacted petitioner's co-defendant Victoria Raaf, who told him that she knew someone in Chicago, John Dillon,[3] who might be interested in buying the securities. Dillon testified that Raaf telephoned him in Chicago, introduced Holmen over the telephone and tentative negotiations were conducted (Tr. 592–602). Petitioner, Raaf and Holmen agreed on a three-way split of the proceeds from the sale of the securities and also agreed that Holmen should be the "front man" to handle the mechanics of the transactions (603–607).

[3] Dillon was a co-defendant in this case who pleaded guilty to count I of the indictment.

Striffler testified that on September 26, 1965, he received a phone call from Holmen, who told him to bring the securities to the Continental Hotel in Los Angeles (Tr. 57). Because Dillon had suffered a heart attack he sent an associate to Los Angeles to get the securities (Tr. 624). The deal was consummated and the securities were taken to Chicago and pledged on September 30, 1965, at the Wheaton National Bank, as collateral for loans totaling $91,000 (Tr. 320–325, 443–466). On September 30, 1965, Dillon's associate returned to Los Angeles and paid Raaf, Holmen, and petitioner their shares of the proceeds (Tr. 658–674).

The government also introduced the testimony of one Curtis Roy Michelson who testified that he had a number of conversations with petitioner in July and August, 1965, regarding the acquisition by Michelson of stolen securities and the disposition of these securities by petitioner (Tr. 1720–1732). The trial court admitted the evidence specifically as bearing on the issue of petitioner's intent (Tr. 1688–1689, 1773–1774). The court of appeals stated that it would have been "a more appropriate procedure" for the trial court to have denied admission of this testimony of another crime until such time as the petitioner attempted to raise some question on the issue of knowledge or intent. The court held, however, that because the trial was conducted without a jury before an able and long experienced trial judge and in light of the overwhelming direct evidence of guilt, the receipt of the Michelson evidence was not reversible error.

2. Even assuming *arguendo* that the court of appeals was correct in ruling that the admission of evidence of other offenses by petitioner was erroneous, even for the limited purpose of proving intent, the court of appeals properly held that the error did not require reversal. As the court below noted, a judge, unlike a jury, is presumed to have exercised appropriate discretion in distinguishing between proper and improper evidence introduced at trial and, in the absence of a clear showing to the contrary, to have based his decision only on the former. *United States* v. *Menk*, 406 F. 2d 124 (C.A. 7), certiorari denied, 395 U.S. 946; *Alexander* v. *United States*, 241 F. 2d 351, 356–357 (C.A. 8), certiorari denied, 354 U.S. 940; *Clark* v. *United States*, 211 F. 2d 100, 106 (C.A. 8), certiorari denied, 348 U.S. 911. Here, as we have detailed it, the evidence of petitioner's guilt was overwhelming. Petitioner's reference (Pet. 7) to the remarks of the trial judge at sentencing, in which the judge commented that he had believed Michelson's testimony, hardly indicates that the court in any way overlooked the direct evidence of petitioner's guilt.

Petitioner's reliance on the decisions of this Court in *Wong Sun* v. *United States*, 371 U.S. 471, and *Fahy* v. *Connecticut*, 375 U.S. 85, is misplaced. Those cases review convictions based on evidence which was inadmissible because of constitutional reasons unrelated either to the inherent relevance or the potential prejudicial effect of the evidence. Here the admission of the questioned evidence—for the limited purpose of establishing intent—does not overcome the presumption that the trial judge decided

the case on the basis of proper evidence, and that he did not succumb to the prejudicial effect that the testimony of prior offenses would more likely have had on a jury. The ruling in *Chapman* v. *California*, 386 U.S. 18, is not to the contrary. Although that was a nonjury case, the evidence in question was highly probative and the trial judge had clearly considered it for all purposes.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JEROME M. FEIT,
LEONARD H. DICKSTEIN,
Attorneys.

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